No. 14739

United States Court of Appeals
For the Ninth Circuit

ROLLAND LINDSEY, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, FIRST DIVISION

BRIEF OF APPELLANT

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JURISDICTION

The Grand Jury of the District Court of United States for the Territory of Alaska, First Division, returned a true bill, charging appellant with three counts of statutory rape and three counts of sodomy alleged to have been committed October 22, 1951, October 23, 1952, and February 27, 1954, respectively, at Ketchikan, Alaska (Violation of 65-4-12 ACLA and 65-9-10 ACLA, 1949; R. 3-5). Count 7 of the indictment charged appellant with violation, Ch. 81, SLA, 1953 (R. 4-5), influencing witness. Appellant by the verdict of the jury was acquitted on Count 7 and therefore no further reference will be made to this Count (R. 6). The appellant was arraigned and entered a plea of not guilty (R. 5). The Federal District Court acquired jurisdiction pursuant to Title 48, Sec. 101 USC and the case was tried in the District Court in accordance with the provisions of Title 18, Rule 54 of Federal Rules of Criminal Procedure. After a trial before a jury which lasted several

[*Italics, wherever used in this brief, are ours*]

days, a verdict of guilty on the six counts of statutory rape and sodomy was returned by the jury (R. 6). On December 3, 1954, the appellant was sentenced for a period of 12 years on the rape counts (R. 8) and for a period of 10 years on the sodomy counts, the sentences to run concurrently (R. 8). The following day appellant duly gave notice of appeal from the judgment and sentence. Appellant upon motion and order was admitted to bail, pending appeal before this court (R. 8, 9).

This appeal is being prosecuted pursuant to Rule 37 of the Federal Rules of Criminal Procedure and was perfected in accordance with the provisions of Rule 39 of the Federal Rules of Criminal Procedure and the rules of the Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

In view of the fact that appellant in his Statement of Points, challenges the sufficiency of the evidence on the ground of lack of the requisite quantum of corroboration (R. 528) appellant deems it advisable to set forth briefly the material testimony of the key witnesses.

The prosecuting witness was 15 years old at the time of the trial (R. 18, 19). She was adopted by the appellant during 1946 or 1947, and lived at the appellant's home with her brother, who is 2 years older, since she reached the age of seven (R. 19, 206). She testified that from the age of 7 onward the appellant engaged in conduct of systematic seduction and debauchery with her (R. 20-23), beginning with his touching of her female organs, followed, subsequently, by acts of

cunnilingus and fellatio and terminating ultimately in sexual intercourse (R. 20-24).

She testified that appellant first attempted to have intercourse with her when she had reached the age of 9 years on appellant's fishing boat, but that the attempt was unsuccessful because of the smallness of her sexual organs (R. 22, 23). She testified that appellant first succeeded in full penetration on October 22, 1951, the day upon which appellant's youngest child was born, while appellant's wife was in the hospital (R. 24). On that occasion she testified that the appellant also committed cunnilingus and had her commit fellatio upon him (R. 26, 70).

She testified that on October 23, 1952, the appellant again raped her and committed sodomous acts upon and with her (R. 29, 71, 72). October 23, 1952, was the date of the birth of appellant's second child and again appellant's wife was confined at a hospital on that day (R. 27, 28). She further testified that on February 27, 1954, the appellant again raped her and committed sodomous acts upon and with her (R. 31). This was the date on which appellant's wife gave birth, in a hospital, to appellant's third child. She further testified that subsequent to October 2, 1951, the appellant had intercourse with her on many occasions at appellant's home, during morning hours, during the day, during evening hours, in her bedroom, in his bedroom and on appellant's fishing boat (R. 72, 73). She testified that appellant had intercourse with her for the last time on March 30, 1954 (R. 36). She then stated that a few days following March 30, 1954, appellant again attempted to

have intercourse with her, but that she cried and then went to the witness, Riewold, to collect wages due her for baby-sitting. On that occasion she called up her previous adoptive mother, in Seattle. For the first time she then stated to Mr. Riewold that the appellant had abused her sexually (R. 37). On or about April 10. 1954, she told, for the first time, to the witness, Riewold, to her brother, to her aunt and to many others that appellant had had sexual relations with her and had committed sodomous acts (R. 38). After she made this statement to Mr. Riewold, she left appellant's home and stayed with her grandmother and a few days later, at the request of the Welfare Dept. of the Territory of Alaska (R. 59), she was sent from Ketchikan to Wrangel to stay at the home of the Federal Marshall. She testified on direct examination that after she had stayed with the Federal Marshall and his wife for four months, she falsely accused the Marshall of having had sexual relations with her. She told his wife that she was pregnant and falsely accused him of having caused her to become pregnant (R. 40, 41). At that time she told the Marshall and his wife that the accusations, which she had made against the appellant were false and untrue and she wrote three letters to appellant, to appellant's wife and to appellant's children asking all of them for forgiveness (R. 40, 90, 92; Defendant's Exhibit "A," three letters).

She advised the Marshall that she wished to drop the charges against the appellant and return to Ketchikan. She arrived at appellant's home before her letters, which she had written at Wrangel (R. 42). She testified (R. 40):

Q. (By Mr. Munson): You said that wasn't true?

A. Yes. [34]

Q. Why did you say a thing like that?

Q. Did you write Mr. Lindsey?

A. Yes, I did.

Q. And what did you tell him?

A. *I told him that I was coming back here to drop all charges that I made because they weren't true, and I got here before the letter did.*

Q. How did you get back here?

A. Well, the only thing I could think of was, *I accused Mr. Krepps of having had intercourse with me when he hadn't, but that was the only thing I could think of to come back . . .*

A. Well, because that was the only way I could think of I could get back here to my Mom and the kids.

Q. Well, did you tell them that it wasn't true?

A. My Mom and Dad?

Q. I mean, Jack and Mrs. Krepps.

A. Yes, I did.

Q. What was your accusation; what did you say, and who did you say it to?

A. I told it to Judy.

Q. And what did you say?

Mr. Ziegler: Told it to whom?

A. Mrs. Krepps. And I told her that—*well, I made up a big story—that I wouldn't be surprised if I was pregnant, and she said, "Why?" And I* said, "Oh, I don't know. I just have a feeling." And she said, "Do I know who did it?" And I said,

"Yes." And she said, "How well do I knew that person?" And I said, "Pretty well." And she went into the house and called up Jack and had him come home.

MR. ZIEGLER: Jack Krepps, do you mean?

A. Yes.

She told appellant that she would drop the charges. He then took her to his attorney's office where, in the presence of the son of appellant's trial attorney, his secretary and the appellant, she was interrogated and gave a full retraction, withdrawing all accusations against appellant (R. 42, 43, 188-206; Appellant's Exhibit "B"; R. 341-347).

See Appendix "A":

On cross-examination she admitted that she also had told her welfare worker that her accusations against appellant were untrue (R. 54). She further admitted that on many occasions during the 5 years preceding the trial, she had run away from the home of her adoptive parents (R. 93, 94). She testified that because of various delinquent acts committed by her, her adoptive parents, prior to the time she made the accusations against the appellant in 1954, had threatened to send her away from home to a correctional institution (R. 95, 96). She testified that the appellant committed many of the acts of which she accused him while her older brother and her mother were at home (R. 102, 103). She stated that prior to the time she signed the retraction under oath (Appellant's Exhibit "B"; Appendix "A") the Federal Marshall had explained to her the meaning and significance of perjury (R. 104).

The older brother of the prosecutrix also testified as a prosecution witness. He stated that on several occasions the appellant, during the early morning hours, would look into his bedroom to see if he were asleep, and then would enter his sister's bedroom (R. 111). He stated that on some occasions when he would see her, afterwards she would have tears in her eyes (R. 111-114). He also testified that on one occasion when the appellant and his sister were alone on the boat, he saw the boat drifting in the bay. He also stated that his sister showed him certain cotton chair stuffing, which she claimed contained sperm (R. 117, 129). He further testified that he found a can filled with rubber contraceptives on the rafters between his sister's and his room (R. 118). On cross-examination he admitted that he had run away from the home 7 or 8 times because he could not get along with his adoptive mother (R. 121). On cross-examination he further admitted that all he found was an empty contraceptive container (R. 129).

The witness, Don Riewold, testified that on April 10 or 13, 1954, the prosecutrix came to his home crying and accused appellant of rape and perverted sexual practices (R. 137). The witness, Florence Dalton, appellant's sister-in-law, likewise testified that prior to Easter, 1954, the prosecutrix had told her of her sexual relations with appellant including the latter's abnormal conduct (R. 144, 145). Dr. Anderson, a psychiatrist, testified that on April 28, 1954, the prosecutrix told him of the sodomous relations with appellant (R. 149).

Dr. Stagg testified that on April 23, 1954, he conducted a medical examination of the prosecutrix and

found that she had a fully developed vagina, relaxed like that of a married woman, accustomed to sexual intercourse (R. 152).

The witnesses called by appellant testified as follows: Lydia Pawsey, appellant's mother-in-law (R. 157), testified that the prosecutrix came to her home during April, 1954, and accused appellant of having raped her (R. 159, 160). That she took the prosecutrix to appellant's home, who was not present, and she accused her father of having raped her in the presence of appellant's wife (R. 166). She further testified that on the same day, the brother of the prosecutrix presented an empty container of contraceptives and claimed that this was the evidence. She further stated that the prosecutrix desired to go to Seattle to live with her previous adoptive mother (R. 178, 179). She testified that upon a search being conducted by her son and the brother of the prosecutrix, no cotton was produced (R. 182).

Pat Pawsey, the brother of appellant's wife (R. 184), testified that when the prosecutrix came to his mother's home during April, 1954, after she had run away from home, she stated (R. 184): "A. She told Mom and I that Rollie *tried* to rape her three times when she came in the house. Q. She said that Rollie had *tried* to rape her three times? A. Yes." He further stated that upon a search of appellant's premises neither cotton nor contraceptives were found (R. 186).

Appellant's wife testified that they adopted the prosecutrix and her brother in 1946 or 1947. That her brother Bob had been delinquent and had spent several months at Boys' Town (R. 207). That during April, 1954, the

prosecutrix for the first time, made any charges against the appellant (R. 211). That during August, 1954, when prosecutrix returned from Wrangel, she stated that she wanted to drop the charges against the appellant because they were untrue (R. 223). She further testified that she never saw any evidence of improper acts between the appellant and the prosecutrix (R. 229). She further stated that upon a search of the house being made, the cotton mentioned by the prosecutrix was not found (R. 239).

The appellant testified that he was fisherman, a logger and a trapper (R. 245), 41 years of age (R. 340); that the prosecutrix on many occasions had committed thefts at appellant's home (R. 246); that she had stolen as much as $100.00 at a time (R. 258), and had been punished by restrictions preventing her from going to dances, church and shows. That upon many occasions she would be very hostile and that shortly before the accusations were made against him he had punished her physically when she talked back to her mother (R. 263, 264). He also stated that shortly before the accusations were leveled against him by the prosecutrix, she was defiant of parental authority and would disregard his commands (R. 265-267). He further stated that he never entered the room of the prosecutrix early in the mornings, that he never made any immoral advances toward her and never committed any immoral acts with her, either in the home, or on the boat (R. 292, 294, 306). He testified that two and a half weeks before the prosecutrix and her brother left his home by running away, he found contraceptives belonging to her brother, Bob (R. 307, 308).

Several character witnesses testified that the prosecutrix had a bad reputation for truth and veracity (R. 350-370).

Dr. Anderson was called as a rebuttal witness by the Government, and testified that he was the only practicing psychiatrist in the Territory of Alaska (R. 374). That he had examined the prosecutrix on April 28, October 6 and 7, 1954, and that on the 8th day of October he gave her a sodium pentathol interview. He stated that this test was recognized by his profession as being highly reliable (R. 377). The test was given in the presence of the District Attorney, a psychologist, and a psychiatrist case worker (R. 382). Over vigorous objection on the part of Defense Counsel, the Court permitted the recording of the sodium pentothal interview of the prosecutrix to be played to the jury (R. 383, 385-401). He further testified that the prosecutrix, while under the influence of the drug, was telling the truth (R. 400), and said it was inconceivable that she had gained the information disclosed by her in any manner other than by actual experience (R. 401, 402). He further stated that while under the influence of sodium pentothal, she was bound to tell the truth (R. 402). It appears that the United States District Attorney participated in the questioning of the prosecutrix during the sodium pentothal interview (R. 404). The Trial Court refused to permit appellant to undergo the same test (R. 418). The appellant called in rebuttal, Dr. Clark, a practicing general physician (R. 426). He testified that sodium pentothal was not a truth serum and that it was not medically accepted as a truth

inducing drug, and that it was not reliable as a means of finding out whether a witness was telling the truth or a falsehood (R. 427, 429, 440).

STATEMENT OF QUESTIONS INVOLVED

1. Did the trial court commit reversible error in permitting to be introduced over objection into evidence a recording of a sodium pentothal interview of the prosecutrix which was taken several weeks subsequent to the time after she had retracted under oath the charges previously made by her against the appellant before the grand jury? Is such evidence admissible as a previous consistent statement for the purpose of corroborating an impeached prosecutrix? Does such evidence constitute inadmissible hearsay? Does the admission of such testimony deprive the defendant of the right to cross-examination and does it deprive the defendant of the right to be confronted with witnesses against him pursuant to the 5th and 6th Amendments to the Constitution of the United States? Does a witness subjected to the influence of sodium pentothal testify voluntarily?

2. May a psychiatrist over objection be permitted to relate to the jury the result of a sodium pentothal test administered to the prosecutrix and may a psychiatrist be allowed to testify that testimony elicited from a witness while under the influence of sodium pentothal would prevent the witness from lying and that the testimony elicited is guaranteed to be truthful?

3. Did the giving of Instruction No. 8-A over objection on the ground that such instruction was predicated

upon admission of incompetent testimony, i.e., evidence of the witness while under the influence of sodium pentothal, constitute reversible error? Was Instruction No. 8-A supported by evidence contained in the record, i.e., was the evidence of the testimony elicited of the prosecutrix upon which this instruction is based a *previous* consistent statement? Is Instruction No. 8-A contradictory and misleading to appellant's prejudice?

4. Was the testimony of the prosecutrix sufficiently corroborated so as to comply with the rule announced in the case of *Kidwell v. United States,* 38 Appeal Cases, Dist. of Columbia, 566, 573? This point is raised for the first time on this appeal and is predicated upon the "plain error" provision contained in Rule 52(b) of the Federal Rules of Criminal Procedure.

5. Did the trial court commit reversible error in admitting evidence pertaining to an alleged collateral crime of appellant and did the United States District Attorney commit reversible error in seeking to introduce testimony of a collateral crime allegedly committed by the appellant? This point is raised for the first time on this appeal and is predicated on the "plain error" provision of Rule 52(b) of the Federal Rules of Criminal Procedure.

6. Did the comment of the trial judge to the effect that the relationship between appellant and prosecutrix implied coercion in obtaining the retraction of the prosecutrix constitute reversible error? Did the action of the trial court in striking the testimony of character witnesses impeaching the character of the prosecutrix constitute reversible error? Did the trial court commit

reversible error in restricting the defendant to showing of hostility between himself and the prosecutrix to the thirty days immediately preceding the making of the accusations against the defendant constitute reversible error? Did the trial court's ruling preventing the defendant from showing hostility existing between the prosecutrix and the defendant's wife constitute reversible error? Did all of the points raised in this paragraph deprive the defendant from having a fair trial? All of the points raised in this paragraph are predicated on the "plain error" provision of Rule 52(b) of the Federal Rules of Criminal Procedure.

SPECIFICATION OF ERRORS

1. The trial court erred in admitting a psychiatrist to testify over objection concerning the results of a sodium pentothal test given to the prosecutrix and the trial court erred in permitting to be played to the jury a recording of the sodium pentothal interview (R. 389 to 399). The attorney for the defendant objected to the psychiatrist being permitted to relate the results of the sodium pentothal interview and to the introduction of the recording while the prosecutrix was under the influence of sodium pentothal on the ground that the proffered evidence was incompetent, irrelevant and immaterial, that the validity of this procedure of examination was not recognized by scientists and that the opinion of the psychiatrist invaded the ultimate province of the jury (R. 375, 376, 379, 383). The substance of the evidence admitted is as follows: (1) The psychiatrist testified that the prosecutrix while under the influence of sodium pentothal could not fail, but tell the truth and

did tell the truth; (2) The recording admitted substantially constitutes a complete reiteration of the testimony of the prosecutrix on direct examination of the relationship between herself and the appellant and the alleged criminal conduct of the appellant toward her.

2. The trial court erred in submitting to the jury Instruction No. 8-A (R. 461-462; particularly the following portions thereof):

> "You are instructed that a witness may be impeached by proof that before testifying he made statements inconsistent with, or contradictory of, his testimony. But he may also be sustained or corroborated and the impeachment *overcome by evidence that at some time prior to the making of the inconsistent or contradictory statements, he has made statements consistent with his testimony.* In this case evidence consisting of four letters and a sworn statement, has been introduced to show that the witness, Loretta Lindsey, has previously made statements inconsistent with, and contradictory of, her testimony. To rebut or overcome this evidence, *and to sustain and corroborate this witness, evidence was introduced to show that the witness, while under the influence of a drug which it is contended rendered her powerless to lie, made statements identical or consistent with her testimony.*
>
> "As to all this evidence you are instructed that if you find that the four letters and the sworn statements are untrue, or the statements in them were falsely made, you should disregard them. *But if you find to the contrary, you will then determine whether she has been impeached,* and in this connection you are instructed that you may find that she *has or has not been impeached.* If you find that she has been impeached, you will then consider

whether she has been sustained or *corroborated by the statements made by her while under the influence of the drug referred to.*"

Appellant's counsel objected to the giving of this instruction on the ground that the instruction was predicated on the introduction of inadmissible evidence, *i.e.,* the testimony of the prosecutrix while she was under the influence of sodium pentothal (R. 449). Appellant for the first time here raises the additional point that the instruction is erroneous because the recording did not constitute a *previous* consistent statement and, further, that the portion of the instruction quoted contains inherently contradictory elements misleading the jury as to the meaning of the word "impeachment."

3. The indictment should be dismissed and appellant should be discharged from further prosecution on the ground that the testimony of the prosecutrix is not sufficiently corroborated.

4. The United States District Attorney was guilty of misconduct constituting reversible error in succeeding in bringing repeatedly before the jury evidence of alleged sexual criminal misconduct of appellant with a third party (R. 145, 371, 395). The substance of the testimony complained of is that the defendant, many years previous to the dates relied on in the indictment of the instant case, had attempted to commit statutory rape upon his sister-in-law. In each instance where the prosecutor attempted to introduce such testimony of a totally unrelated collateral crime, objection of defense counsel was sustained, but prejudice to appellant had resulted (R. 145, 371, 395).

5. The trial court committed reversible error in repeatedly commenting on the evidence to the great prejudice of appellant. The trial court on several occasions stated that Defendant's Exhibit B (See Appendix A), consisting of the sworn retraction of all charges made by the prosecutrix, was a result of implied coercion and implied undue influence practiced by appellant upon the prosecutrix. The prejudicial comments of the trial court are found as follows: (R. 193, 194, 196, 198.) No objection was made to the trial judge's comments at the time of the trial.

6. The trial court erred in striking the testimony of all character witnesses impeaching the reputation of the prosecutrix for truth and veracity (R. 352, 359, 361, 364, 369). The trial court erred in limiting showing of hostility between appellant and the prosecutrix to the thirty days immediately preceding the bringing of charges by the prosecutrix against appellant (R. 259). The trial court erred in preventing appellant and preventing appellant's wife from introducing evidence showing hostility existing between the prosecutrix and appellant's wife (R. 216, 217).

ARGUMENT

I. The evidence of the testimony submitted to the jury by a recording of the interview of the prosecutrix while she was under the influence of sodium pentothal was inadmissible to corroborate the prosecutrix and the psychiatrist should not have been permitted to relate to the jury the results of the sodium pentothal interview because such tests are unreliable and no court within the 48 states or within the federal jurisdiction has ever permitted such a recording to be introduced.

a. The admission of such testimony constitutes reversible error because it is highly prejudicial to the defendant in that is merely repeats the testimony given by the witness during her examination in chief.

b. Testimony given by a witness while under the influence of sodium pentothal is inadmissible because both legal and medical authorities are agreed that such testimony does not bear the earmarks of a guaranty of truth, but, on the contrary, is unreliable and its use has never been sanctioned by any appellate court. A witness while under the influence of sodium pentothal is open to suggestion and if the individual is neurotic or psychotic, the interrogation will evoke fantasies rather than a true picture of the events related by a witness.

c. Since the witness interviewed in this manner subsequently will not remember the questions asked or the answers given by her, defense counsel is totally deprived of the right to cross-examination. Such deprivation constitutes a violation of the due process provisions of the 5th Amendment and of the right of confrontation of the witness under the 6th Amendment of the Constitution of the United States.

d. Such testimony is not voluntary testimony and is, therefore, inadmissible.

Appellant is convinced that the trial court's permitting the psychiatrist to testify as to the results of the sodium pentathol interview of the prosecutrix and the playing of the record of the interview (See Appendix B; R. 385-399) entitle appellant to a new trial irrespective of the other errors assigned on this appeal.

In the instant case, the trial court permitted the sodium pentathol recording to be admitted under the following circumstances:

During August the prosecutrix admittedly had signed a complete retraction of her accusations against appellant. The retraction was sworn to by her after she had previously admitted to the Federal Marshal, who was then her custodian, that the accusations which she had made against her father under oath before the Grand Jury were false and untrue. Admittedly, without any influence whatsoever having been brought to bear upon her on appellant's part or appellant's wife's part or any member of appellant's family, the witness wrote several letters to appellant, his wife and appellant's children asking for forgiveness (D's Ex. A). At that time she had falsely accused the Federal Marshal of improper sexual relations with her and was fully aware of the seriousness of making a false accusation under oath (R. 103, 104). She then returned from Wrangel to Ketchikan before her letters had arrived and upon going to appellant's home she immediately advised him and his wife that she would drop as being untrue her previous accusations against appellant. She was then taken by appellant to the office of his attorney. It should be stressed that there is not one iota of evidence in the

record showing that the slightest degree of undue influence was exercised upon her in order to obtain the retraction or while she was being interrogated with reference to the matters contained in the retraction. She was interrogated and a statement in question and answer form was taken of her by the son of defendant's attorney, who himself is a practicing lawyer (R. 104). After the interrogation had been concluded and after it had been transcribed within a few hours, it was then read over by her and signed by her under oath (R. 190), after the significance of the oath again had been impressed upon her mind (R. 190). The retraction (See Appendix A) of course completely impeaches the prosecutrix. There is no showing in the record that any specific answers contained in the retraction was suggested to the prosecutrix. About six weeks thereafter she was examined by the psychiatrist and was advised that a truth serum would be given to her the following day (R. 375). The questions during the interview were asked primarily by the psychiatrist and the United States District Attorney who tried the case apparently asked some of the questions. Over vigorous objection of the defense counsel, the trial court permitted the recording of the interview to be played to the jury. A reading of the recording (See Appendix B) will show that in effect the prosecutrix reiterated the identical testimony which had been given by her on direct examination. A hearing of the record unquestionably will convince this court of the dramatic effect it must have had upon the jury. While it is true that the trial court later instructed the jury (Instruction No. 8-A) that

the recording was not substantive evidence, but was admitted solely for the purpose of eliminating the impeaching effect of the retraction, it is submitted that the distinction made by the trial court is one too subtle to be appreciated under the dramatic circumstances by the ordinary men and women constituting the jury. The reverberating sounds of the accusatory tones no doubt overcame the distinction between "substantive and other evidence."

The subject matter of the admissibility of a statement to rehabilitate an impeached witness is discussed at length in an exhaustive annotation contained in 140 A.L.R. 21 to 186. A reading of this annotation clearly shows that in a majority of jurisdictions such statements are held to be inadmissible *under any circumstances.* The writer of this annotation states, at page 49:

> *"The weight of authority is to the effect that when the credibility of* a witness is assailed because, on some former occasion, he has made statements that differ from his statements under oath at the trial, *his sworn testimony may not be corroborated by proof that on other occasions and at other times his statements were in harmony with his testimony."*

In those jurisdictions which do allow such statements of a witness to be introduced, it is clear that it is a requirement that the consistent statement must precede the statement by which the witness has been impeached. Thus the writer of the annotation comments, at page 72:

> "Even in jurisdictions which permit either generally or under some circumstances the introduc-

> tion in evidence of statements consistent with the testimony of a witness impeached by proof of having made inconsistent statements, *it has been held that such consistent statements, to be admissible, must have been made prior to the statements by which the witness was impeached.*"

In addition, in those jurisdictions which allow such a statement to be used to rehabilitate an impeached witness, a showing must be made that at the time of the making of the rehabilitating statement the witness had no motive to falsify, bias or interest. Thus the writer of the annotation remarks at page 117:

> "Inherent in the exceptions to the general rule that prior statements consistent with the testimony of an impeached witness are inadmissible in support of his credibility, that pertain when the witness has been impeached on the ground of motive to falsify, bias, or interest, or by a charge of recent fabrication of his testimony, is the requirement when the alleged motive to falsify did not exist, or when the ultimate effect of the statement could not have been foreseen."

In the instant case, the prosecutrix, being fully aware at the time the statement was made of the fact that she might be subjected to perjury charges, had, of course, all the reason in the world to falsify and to lie.

Finally, it has been pointed out that such a statement for the purpose of rehabilitation must be made voluntarily. Thus, the writer of the annotation states, at page 165:

> "A statement made under duress is not, under any circumstances, admissible in corroboration of impeached testimony . . ."

It is difficult to see how a statement given under the influence of sodium pentothal may be considered to be a *voluntary* statement.

It should be noted that the Federal courts have followed the rule rejecting in toto previous consistent statements used to rehabilitate an impeached witness. The precise issue was presented in the case of *United States v. Sherman,* 171 F.(2d) 619, decided unanimously by the appellate court. It appears that in the *Sherman* case where the defendants had been charged with larceny and transportation of stolen goods, a witness implicated in the theft in a statement given to the F.B.I. had not mentioned the defendant Sherman as a participant in the crime. At the trial, this witness implicated the defendant Sherman and stated that he had participated in the commission of the crime. Sherman then succeeded in having introduced the first statement given by this witness to the F.B.I. The trial judge then permitted the prosecution to introduce a subsequent second statement wherein this witness had implicated the defendant Sherman. Reversing the conviction as to the defendant Sherman, the Circuit Court of Appeals, in a carefully reasoned decision prepared by L. Hand, held as follows (p. 621):

> ". . . Sherman put in the written statement to impeach this testimony; and to break the force of the impeachment the judge allowed the prosecution to get before the jury part of the contents of a second written statement, made by Oliva to an officer a few weeks after the first, in which he told the story as he had testified on the stand.
>
> "Concededly the second statement was not competent unless the admission of the impeaching

statement made it so, for when Oliva made it he had the same motive to fabricate — the hope of lenity—that he had while on the stand.

"Rationally, it is true, the fact that he changed his story so soon after making the contradictory statement, may have added to the persuasiveness of his testimony; and for that matter most persons would probably consider any earlier consistent account, in some measure at least, confirmatory of a witness's testimony. *The reason for its exclusion is because it has not been made on oath rather than because it had no probative value,* although courts have often spoken as though it had none. *However, such a statement is as incompetent when the witness has been impeached by an inconsistent statement, as when he has not been.* So the Supreme Court decided many years ago.

"And although the point has apparently never come up again in that court, the lower federal courts have several times applied or recognized the doctrine.

"It is true that, when the witness's testimony was not impeached, but only 'aspersed' by the defendant's counsel, we held that the admission of such a corrobatory statement was harmless error, but we should scarcely have warrant for doing so here. Sherman's connection with the stealing of the truck was of course crucial under the first count, and nearly so under the third. Oliva's failure to include him in his first version might well have thrown doubt upon his later testimony; and, as we have just said, his early correction of that version was, rationally, not an inconsiderable circumstance. The prosecutor certainly thought so, for he used it in summing up the case to the jury. We cannot be certain that it made no difference in the verdict,

and Sherman's conviction must be reversed and the cause remanded as to him. . ."

See, also, the decision in *Dowdy v. United States,* 46 F.(2d) 417, where a judgment of conviction was reversed on the ground that the trial court had erroneously permitted the prosecution to introduce previous consistent statements of an impeached witness and hearsay statements of admissions of the defendant. It should be noted that in that case the decision was reversed although the trial court had specifically instructed the jury that such hearsay statements were admitted only for the purpose of corroboration. The Circuit Court of Appeals for the 4th Circuit ruled at page 425:

". . . But assuming, however, that it was admitted for that purpose, and that the jury were sufficiently cautioned, nevertheless we do not think that it was admissible. Martin had been arrested on numerous charges which were then pending. The National Prohibition Act itself (tit. 2, §30 (U.S. Code, title 27, §47, 27 USCA §47)) gave him immunity if he should testify. In view of all the surrounding circumstances, it is obvious that a motive to testify falsely existed then fully as much as it did at the time of the trial. The conversation in which the statements were made did not occur soon after the transactions that he detailed, but long afterwards. Nor do we think that statements made in such circumstances would reasonably furnish the jury a test of the witness's integrity and accuracy of recollection. As already stated, these statements were nothing more than a confession implicating others; and to allow such evidence to go to the jury would not only be exceedingly dangerous

to the innocent, but subversive of the fundamental rights of the accused in a criminal trial."

and, at page 427, as follows:

"But we cannot overcome the impression that permitting Trexler to testify in detail to all of Martin's various and lengthy statements to him, implicating Funk, must have been prejudicial. It is true that Martin testified practically to all of these same matters upon the witness stand; and to a discriminating mind, the fact that Martin had made the same statements to Trexler that he made upon the stand might not have added any weight to his testimony. But jurors are not trained in such matters. The testimony was admitted 'as corroborating Martin,' *and the jury must have received the impression that it had that effect.* We are of the opinion therefore that the admission of this testimony was prejudicial error, and the judgment against Funk must be reversed and a new trial granted him, but on that ground alone."

It having been demonstrated that quite apart from the witness having been under the influence of sodium pentothal the rehabilitating statement was inadmissible, appellant next contends that Dr. Anderson, the psychiatrist, should not have been permitted to express his opinion as to the credibility of the prosecutrix because of the unreliability of the sodium pentothal test and that the recorded interview was inadmissible.

Various state and federal courts during recent years had to meet the problem of deciding whether the results of such tests are admissible. In most instances, requests for admission were made by defendants who offered to introduce into evidence the results of lie-detector tests or sodium pentothal or sodium amytal tests. It should

be stressed that to the knowledge of the writers of this brief there is not one single instance where any appellate court within any of the forty-eight states of the United States or within the federal jurisdiction has ever sanctioned the admission of such testimony—perhaps with the exception that in one or two instances the results of such tests were admitted where previous to the trial counsel on both sides had expressly stipulated that the results of such tests could be admitted in evidence. Recent cases on the point under consideration are collected in an annotation in 23 A.L.R.(2d) 1306-1311, entitled "Physiological or Psychological Truth and Deception Tests." Summarizing the conclusion to be deduced from the cases noted in this annotation, the writer of the annotation succinctly states at page 1310:

> "Truth serum tests occupy much the same position as lie detector tests, and no court has as yet recognized the admissibility of the results of such tests."

In the case of *Henderson v. State* (Criminal Court of Appeals of the State of Oklahoma) 230 P.(2d) 495, the defendant, who had been convicted of forcible rape, contended on appeal that the trial court had committed reversible error in excluding the results of lie detector and truth serum tests which had been taken by the defendant. Negativing this contention, the court, reviewing a great many of the scientific articles on the subject of sodium pentothal and the precedents established concerning the use of the results of testimony derived from lie detector and truth serum tests (pages 501-506) stated unequivocally at page 505:

> "As to the truth serum tests, it is even more experimental than the lie detector test."

In the case of *State v. Lowry,* 185 P.(2d) 147, the Supreme Court of the State of Kansas granted a new trial to the appealing defendant on the ground that the trial court had erroneously permitted expert testimony concerning the results of lie detector tests given to the defendant and the prosecuting witness. The expert had testified that the defendant, according to the tests, lied and that the prosecuting witness told the truth. In this well reasoned decision the Supreme Court of Kansas recognized the following dangers incident to the admission of the results of such tests: (1) That a party might introduce only those tests favorable to him and the opponent would be deprived of cross-examining the witness while he is being tested; (2) that it would be difficult to expose an incompetent or dishonest expert (page 152). The court decided that since the results of the lie detector tests went to the heart of the controversy, *i.e.,* the respective credibility to be attached to the defendant and the prosecuting witness, the defendant had been highly prejudiced by the admission of this testimony and was entitled to a new trial.

The skepticism concerning the scientific potentialities of sodium pentothal as a truth-evoking serum, which has prevented courts from admitting the results of sodium pentothal or sodium amytal tests is fully shared by numerous authorities in the field of forensic medicine. It should be noted that C. T. McCormick, one of the outstanding writers in the evidence field, in an article written during 1926 in 15 Cal. Law Review 484 entitled "Deception Tests and the Law of Evidence" remarked concerning the use of scopolamin, an anesthetic

used for the same purpose as sodium pentothal and sodium amytal (p. 503):

> "The use of drugs to produce a state where conscious suppression is impossible has not won acceptance even in theory."

In his recently published treatise, "Handbook of the Law of Evidence," Charles T. McCormick, West Publishing Company, 1954, Para. 175, p. 375, the same writer, after having watched the progress of the use of sodium pentothal and amytal for twenty years, arrives at the following conclusion (p. 374):

> "Defendants so far have offered such drug-induced statements without avail. Since this technique is even more clearly in the experimental stage than the lie detector method, judicial notice of its validity could not be accorded. . . . "

Two faculty members of the Yale School of Medicine and two faculty members of the Yale School of Law jointly prepared an article entitled, "Drug Induced Revelation and Criminal Investigation," 62 Yale Law Jrnl. 315 (1952-1953). After a thorough explanation of the physiological and psychological aspects of sodium pentothal tests, the writers of this article arrive at the following conclusions:

1. People will not always tell the truth while under the influence of sodium pentothal.

2. Persons with neurotic tendencies are likely to substitute fantasies in place of truth and normal individuals will be able through the use of will power to resist disclosing the truth.

3. A transcript or recording of a sodium pentothal interview should not be admitted in evidence because

both judges and juries would be at a loss to evaluate the testimony presented.

4. The sciences of physiology and psychology have not progressed to a point where with or without narcoanalysis (analysis of testimony given while subject under influence of sodium pentothal or similar drugs) scientists trained in these fields are able to evaluate correctly the truth or falsity of testimony of witnesses.

5. Subjects have under the influence of sodium pentothal been able to withhold correct information, have been able to distort facts and, in many instances, erroneous data were elicited through suggestion on the part of the interrogator. The writers of this brief believe that a reading of this article will prove to be of great value to the court. To enable this court to review the salient points of the article, we have taken the liberty to include excerpts therefrom in the appendix (Appendix C).

One of the leading European criminologists, in an article entitled "The Judicial Use of Psychonarcosis in France," Vol. XL, The Journal of Criminal Law and Criminology, 1949, 370, draws the following conclusions, at page 371:

> "Professor Delay and the majority of psychiatrists assert that psychonarcosis is not able to check the determined will of concealing a precise point, while Dr. Scharlin, chief of the neuropsychiatric department of the Regional Hospital Department of Besancon, gives the following results of about a hundred experiments which have been undertaken under conditions similar to these which are met with in judicial matters. In 12% cases the results prove completely satisfactory; for instance, a miner subjected to narcosis said the following: 'It's

> queer your stuff; makes one talk all right; the murderers need to be mighty careful with you.' In 30% cases the examination is only able to obtain precisions on secondary details, as the will controls the important answers; finally, in about 60% cases, the results are completely negative."

and, at page 380:

> "In fact, the narcoexamination obtains too rarely valuable results to contemplate its use at present. And even if a superpenthotal were perfected, it would be necessary to undertake systematic research in order to train experts capable to avoid or baffle the chances of suggestion or affabulation. It is doubtful that this may be contemplated in the near future."

In a well-considered article in 14 Univ. of Chicago Law Review 601 entitled "Legal Aspects of Drug-Induced Statements," Leon M. Despres points to the following danger incident to the use of these tests (p. 604):

> " . . . There is reduction of the critical sense, an enhancement of rapport, and often *a pouring out of both truth and fantasy equally. . . .* "

and, at page 605:

> "In psychotherapy, the physician's skill depends on his obtaining recitals of internal, external, and mixed events, and on his ability to suggest developments and reconciliations. *In law, we reject for untrustworthiness a method of interrogation which mingles external events with imaginary occurrences and shapes the answers of the subject to the suggestions of the examiner.* Thus, however striking their medical uses, the drugs are not 'truth serums'; they dissolve inhibitions and tend to stimulate unrepressed expressions of external fact, of *fancy and of suggestion.*"

Appellant challenges appellee to produce legal or medical authorities substantiating the statements made by Dr. Anderson at the trial concerning the reliability of the sodium pentothal test.

Since the subject of a sodium pentothal interview, if the drug has been properly administered, is unable subsequently to recall his testimony, opposing counsel consequently is completely deprived of the only practical weapon developed in the legal arena to ascertain the truth, *i.e.,* the utilization of a probing and searching cross-examination. It is respectfully submitted that this court should not sanction the admission into evidence of a recorded sodium pentothal interview until the time has arrived when physiologists and psychologists and psychiatrists with scientific unanimity have arrived at a general consensus that this method of searching for truth has achieved such a high degree of reliability that cross-examination becomes unnecessary. We trust that the members of this court will find themselves in agreement, until such time will have arrived, with the conclusion reached by the Supreme Court of New Mexico in the case of *State v. Lindemuth,* 243 P.(2d) 325, at 336:

> "Until the use of the drug as a means of procuring the truth from people under its influence is accorded general scientific recognition, we are unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposite views on the same facts and conditions, to the despair of the court reporter and the bewilderment of the fact finder."

It should be noted that in the *Lindemuth* case, *supra,*

the defendant's conviction was affirmed. The appellate court decided that the trial court had not committed error in refusing to permit a psychiatrist to testify concerning the results of a sodium pentothal test which had been administered to the defendant prior to the trial. In that case, as in the instant case, the psychiatrist would have testified that the witness, while under the influence of the test, told the truth.

The admission of the sodium pentothal recording at the trial not only constituted the admission of inadmissible hearsay, but, since counsel for the defendant was precluded from the right of cross-examination, we contend that the admission of the recording constitutes a violation of the 6th Amendment to the Constitution of the United States.

In the case of *Delaney v. U.S.,* 263 U.S. 586, 68 L.Ed. 462, 465, the Supreme Court of the United States recognized that the reception of hearsay testimony over objection may be serious enough to deprive a party of the right of confrontation guaranteed by Article VI of the Constitution of the United States. The court states as follows (p. 465):

> "It is contended that hearsay evidence was received against petitioner, and this is erected into a charge of the deprivation of his constitutional rights to be confronted with the witnesses against him. *Hearsay evidence can have that effect, and its admission against objection constitute error . . .* "

It must be emphasized that the right of confrontation protected by Article VI of the United States Constitution includes the right to have witnesses give testimony in the presence of the defendant so as to afford

him an opportunity for cross-examination. See *Curtis v. Rives,* 123 F.(2d) 936, 938.

Having been totally deprived of the benefits of cross-examination of the prosecutrix while the latter was under the influence of sodium pentothal, this appellant, in effect, finds himself in the same position as the defendant did in the case of *U. S. v. Douglas,* 155 F.(2d) 894. In that case a judgment of conviction was reversed on the ground that the information charging the crime, which had been given to the jury, had attached to it an affidavit of a witness who had not been called to testify at the trial. Reversing the judgment of conviction, the Circuit Court of Appeals for the 7th Circuit ruled (p. 896):

> "Furthermore, we are of the view that the question presented is too serious to go unnoticed even though it was not properly raised in the court below. Amendment VI of the Constitution of the United States provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The submission to the jury of the affidavits complained of was a palpable infringement of this constitutional right."

Finally, a witness while being examined while under the influence of sodium pentothal is definitely subject to suggestions on the part of the interrogator, as was pointed out by the writers of the articles referred to previously. It follows, therefore, that the testimony of the witness while under the influence of sodium pentothal cannot be said to be voluntary. In other words, the testimony of a witness under those circumstances should

not be accorded any more validity than testimony of a witness subject to duress or undue influence. This is an additional reason why the admitted recording was incompetent.

The court will realize that in the absence of any direct corroborating testimony and in the absence of any admissions or confessions on the part of the appellant, the outcome of the trial in the instant case depended essentially upon the evaluation by the jury of the credibility of the prosecutrix. For this reason the admission of the testimony of Dr. Anderson and his conclusions as to the absolute validity for evoking truthfulness of the sodium pentothal test and the admission of the recording itself clearly prejudiced appellant to a degree necessitating a new trial.

II. Instruction No. 8-A is erroneous because it is predicated on the admissibility of the sodium pentothal interview which is not a previous consistent statement and the instruction is inherently contradictory

Instruction No. 8-A (R. 461), previously set forth in part, was objected to on the ground that it was predicated upon the admissibility of the sodium pentothal test. If the admission of the opinion of the psychiatrist and the admission of the recording constitute error, it follows, of course, that the instruction constituted error. Having given numerous reasons why the admission of this disputed testimony constituted error, we will not repeat the arguments made under point I of this brief. However, appellant wishes to stress two additional points:

(1) From the reading of Instruction No. 8-A it ap-

pears that the trial court thought it was following the few jurisdictions admitting previous consistent statements of an impeached witness. We have shown that a large majority of the courts, including the federal courts, reject this view. Even if this court were to follow the minority rule, it should be pointed out that the recording does not constitute a previous consistent statement. It is undisputed that the sodium pentothal test was given six weeks subsequent to the time the prosecutrix had given the retraction impeaching her.

(2) Instruction No. 8-A *inter alia* contains the following language:

> "As to all this evidence you are instructed that *if you find that the four letters and the sworn statements are untrue,* or the statements in them were falsely made, you should disregard them. *But if you find to the contrary you will then determine whether she has been impeached,* and in this connection you are instructed that you may find that she has or has not been impeached."

It is submitted that this portion of the instruction is inherently contradictory and must have been misleading to the jury. Clearly, if the jury found that the statements contained in the letters and the sworn statement were true, there can be no question that the witness was impeached.

It is appellant's position that in view of the errors committed in the giving of this instruction appellant is entitled to a new trial. Appellant reiterates that the cautionary portion of the instruction (R. 463), in our view, does not overcome the injurious effect the admission of the testimony must have had upon the jury. See

Dowdy v. U. S., 46 F.(2d) 417, 425. Even if the disputed evidence had only been used for purposes of corroboration, in the instant case its admission damaged appellant irreparably because the disputed evidence cut directly the jugular vein of the trial, *i.e.,* the credibility of the prosecutrix.

III. The testimony of the prosecutrix lacks sufficient corroboration and judgment of acquittal should have been entered

Appellant is convinced that the testimony of the prosecutrix lacked sufficient corroboration permitting the judgment of conviction to stand. While some state courts have held that a conviction of statutory rape may be sustained on the uncorroborated testimony of the prosecutrix, other states, including the federal courts, have insisted on the requirement of some corroboration. See exhaustive annotation on this subject in 60 A.L.R. 1124-2255, "Necessity and Sufficiency of Corroboration of Prosecuting Witness in Prosecutions for Rape." It is a matter of common knowledge and perhaps, since Lord Hale's aphorism, even a matter of judicial notice that accusations of rape are easily fabricated and very difficult to disprove. In the Statement of the Case, appellant has attempted to give the court a full picture of all of the material testimony adduced at the trial. The following factors impress the writers of this brief as being of utmost significance:

(1) The appellant, a man of forty years of age, has never been convicted of any offense.

(2) He has at all times completely protested his innocence.

(3) His testimony at the trial protesting his inno-

cense stands unimpeached except for the accusations of the prosecutrix.

(4) Although the acts alleged to have been committed by appellant on innumerable occasions during the period of five years preceding the trial at the home of the appellant while other adults, including the brother of the prosecutrix, who testified for the Government, were allegedly present, no real or direct, evidence was adduced incriminating appellant.

With reference to the prosecutrix, on the other hand, we find that her testimony was impeached time and time again by direct as well as by circumstantial evidence:

(1) It is undisputed that the first complaint is made by the prosecutrix six weeks subsequent to the last act of claimed intercourse with appellant.

(2) Admittedly, the prosecutrix at that time wanted to leave the home of her adoptive parents. Because of her delinquent behavior she was in danger of being sent to a correctional institution by appellant,

(3) Immediately upon making the accusation against her father, she called her previous adoptive mother in Seattle wanting to make arrangements to live with her.

(4) There is no independent evidence that defendant physically abused the prosecutrix and no satisfactory explanation is offered for the failure of the prosecutrix to have made complaint during the five-year period during which she claimed the outrages to have occurred.

(5) Although her brother is at at all times a close confidant, when on one occasion he asked her about possible misconduct of the defendant, she expressly denied it (R. 118).

(6) Neither the incriminating cotton nor the rubber contraceptives were found although immediately after making the accusation a thorough search was made of appellant's home by several people, including the brother of the prosecutrix.

(7) That the failure on the part of the prosecutrix to have made complaint earlier cannot be blamed on bashfulness is clearly demonstrated by the fact that the prosecutrix first made the accusation to a stranger, and to a male at that, and then she immediately proceeded to let all the world know of the outrages allegedly perpetrated upon her.

(8) When she goes to the home of her grandmother immediately after having made the accusation against appellant to Don Riewold, the nature of the accusation takes on a completely different form (R. 184):

> "Q. All right. And what did she repeat that day when she came to your home, as you recall?
>
> A. She told Mom and I, that Rollie TRIED TO RAPE HER THREE TIMES, when she came into the house.
>
> Q. She said that Rollie had *tried to rape her three times?*
>
> A. Yes."

(9) Again we find that when the prosecutrix subsequently again had a motive to leave a home, she likewise accuses a member of that home of having raped her. Admittedly, the accusations against the Federal Marshal were made of whole cloth and solely for the purpose of being able to return to appellant's home.

(10) Confronted with this fabrication by the Federal

Marshal, we find that at the same time the prosecutrix admits that the accusations previously made against appellant are likewise false. It should be noted that there is no possible inference in the record that while the witness was with the Federal Marshal she had any contact with appellant or his family or that she could have been subjected to any influence on appellant's part.

(11) Does it ring true that a girl whose feelings were outraged as hers must have been if the accusations were true would want to return to live at the home of the man who had perpetrated these alleged atrocities upon her? The fact of her return alone, it is submitted, speaks louder in favor of appellant's innocence than any accusation leveled by her against appellant.

(12) The prosecutrix made a complete retraction of her accusations under oath, being fully aware at the time of making the retraction of the penalties of perjury.

(13) In the retraction (Defendant's Exhibit B; R. 341-343) we find the following (R. 342):

> "Q. Loretta—why did you and your brother run away?
>
> A. *I kind of wanted to go to my step-mother's* in Seattle and [376] I phoned her up and she didn't know what to do. *I was kind of disappointed* and I really don't know exactly why I said what I did about my father and that is the only reason I can think of that I did it.
>
> Q. You mean then that by saying what you did you thought you would be able to go to live with your step-mother?
>
> A. Yes."

(R. 343):

"Q. Did you realize, Loretta, when you testified to all these charges in the Commissioner's Court at the preliminary hearing, that you were under oath to tell the truth?

A. *I knew I was under oath but that didn't mean anything to me then.* But when I was up in Wrangell, Jack (Krepps), the Marshal up in Wrangell, told me what it meant when you lie under oath. I believe he had an idea I had been lying. Last Sunday and Monday (August 22nd and 23rd) *I told him I was lying. . . .* "

(R. 343):

"Q. Did you name specific instances and dates at the hearing?

A. Yes, I did.

Q. Where were they supposed to have taken place?

A. At our home on Woodland Avenue, when Mrs. Lindsay was having children. They were the *only dates when I knew he was home as he is gone a lot of the time.*

Q. That is the reason you named those specific dates then, because you knew if the authorities checked they would find out that he was at home at those times?

A. Yes."

(14) She claims the appellant advised her to give a false answer to explain the results of her medical examination showing her habituation to sexual intercourse. The defendant was supposed to have done that in the presence of his mother-in-law and his wife. They

both denied it. It must be noted that this whole matter arose entirely on the suggestion of the prosecutrix according to her own testimony (R. 45):

> "A. Well, a few days later, when I went up to the house to see the kids, he—*I asked him what should I do at this thing if they asked me because I told him the doctor's examination shows that I have had intercourse with somebody,* and he said, "Well, just tell them that you stuck a banana or something up you."

(15) Finally, numerous character witnesses attested to her bad reputation for truth and veracity.

When we look at the corroborating factors to be present, what do we find:

(1) Unquestionably, appellant had opportunity to commit the crimes on the dates stated in the indictment.

(2) The medical examination proved that the prosecutrix was used to sexual intercourse.

(3) The brother of the prosecutrix testified that he would hear the defendant enter the room of the prosecutrix on some occasions early in the morning.

(4) The brother of the prosecutrix would be sent out of the house on occasions when appellant would be alone with her. On the other hand, it was shown that the brother of the prosecutrix was a delinquent child who had spent some time in Boys' Town and that upon specific inquiry on his part, the prosecutrix denied the commission of an immoral act on the part of the appellant.

(5) Two and one-half weeks prior to the time the accusations were made by the prosecutrix, the defend-

ant found rubber contraceptives in the possession of the brother of the prosecutrix.

In many cases it has been held that mere access or opportunity to commit the crime of rape is insufficient corroboration. See annotation in 60 A.L.R. 1124 entitled "Necessity and Sufficiency of Corroboration of Prosecuting Witness in Prosecutions for Rape," at page 1144. Many cases likewise have held that complaint and disclosure by prosecutrix does not constitute "other evidence" in corroboration of testimony of prosecutrix (60 A.L.R. 1148). Appellant is convinced that under the testimony disclosed in the instant case sufficient corroboration as required by the federal courts ever since the decision in the *Kidwell v. U.S.,* 38 Appeal Cases, Dist. of Columbia, 566, is entirely lacking. In that case the District Court of Appeals of the District Court of Columbia reasoned with persuasive force entirely applicable to the facts in the instant case, at page 570:

> "It is difficult to conceive of a condition more embarrassing or prejudicial to the defendant than the one here presented. In a felony of this enormity, where a conviction will be sustained upon the unassailed testimony of a single witness, and that the injured party, and where the difficulty of making a defense is unusually great, it is the duty of the court to carefully safeguard the defendant at every stage of the proceeding, and secure to him a trial legal in all respects. . . . "

and, further, at page 573:

> "The prosecutrix Steele testified that she had made her home with defendant and his wife, her uncle and aunt, since she was a small girl, and that

> defendant had had sexual intercourse with her for the last three years, whenever an opportunity was afforded. We are aware that a conviction for this offense will be sustained upon the testimony of the injured party alone. But where the courts have so held, the circumstances surrounding the parties at the time were such as to point to the probable guilt of the accused, or, at least, corroborate indirectly the testimony of the prosecutrix. In this case defendant was convicted under this count upon the bald statement of the prosecutrix that the acts had extended continuously over a period of three years in the house of defendant, where his wife and family resided. In view of the respectable standing of defendant, as shown by the evidence, and the incorrigible character of the prosecutrix and her bad reputation for truth and veracity in the community where she resided and was known, we do not think the evidence in support of this charge rises to the required standard. *Although no objection was interposed upon the ground of the insufficiency of the evidence to support a verdict of guilty on this count, in a felony of this magnitude, when the evidence is totally inadequate to satisfy the demands of justice, the court should of its own motion, correct the error.*"

That the federal courts require corroboration in cases of this kind and that the *Kidwell* case, *supra,* is still a valid precedent can be seen from a reading of the decision in case of *Ewing v. U. S.,* 135 F.(2d) 633, at page 636:

> " . . . Lord Hale's aphorism concerning these accusations still is valid and for that reason, as the *Kidwell* case declares, 'it is the duty of the court to carefully safeguard the defendant at every stage of the proceeding, and secure to him a trial legal in

all respects.' Hence corroboration, in the sense that there must be circumstances in proof which tend to support the prosecutrix' story, is required, and for lack of it Kidwell's conviction for one offense was reversed."

Although appellant at the trial did not make a motion for a directed verdict, we urge this court to consider the whole record and contend earnestly that there was insufficient corroboration of the testimony of the prosecutrix and that for this reason the judgment of conviction should be reversed and the charges against appellant should be dismissed.

IV. The repeated attempts of the United States District Attorney to bring before the jury evidence of an independent collateral crime constitute plain and reversible error entitling appellant to a new trial

On three occasions during the trial there was brought before the jury evidence of an independent collateral crime. When the District Attorney examined the witness Florence Dalton on direct examination, the following occurred (R. 145):

"Q. Now, Mrs. Dalton, I want you to go back in your memory now and tell the jury and the Court *if you recall having any experience with the defendant?*

MR. ZIEGLER: Now, if the Court please, we object to that as absolutely immaterial and highly prejudicial to the defendant.

MR. MUNSON: Your Honor, I believe that this is admissible to show motive, pattern, intent—

THE COURT: But not until after there has been, not until—evidence of this kind is admissible only

on rebuttal after the defense has put in issue the matter of intent or disposition or system or anything of that kind.

MR. MUNSON: May I approach the bench, your Honor?

THE COURT: Yes.

Whereupon respective counsel and the court reporter approached the bench, out of the hearing of the jury, and the following occurred: . . . "

Again on cross-examination of appellant the District Attorney referred to an alleged criminal relationship between the appellant and the witness Florence Dalton as follows (R. 370, 371):

"Q. (By MR. MUNSON): Mr. Lindsey, I want you to go back in your memory now to a time when your sister-in-law, Florence Dalton, was a baby sitter at your house.

A. I don't remember her baby-sitting at my home. I don't remember.

Q. I will ask you this way then. Could it be—I mean, you just don't remember; this was quite a long time ago—could it be that when Florence was twelve or thirteen years old that she was a baby sitter in your home on a night that you and your wife and possibly Larry Pawsey were out in the evening?

A. How long ago was this supposed to have been now?

Q. Oh, quite a few years ago. Could it have happened?

A. Well, anything, I suppose, could have.

Q. Here is what I want to ask you.

THE COURT: Well, it makes no difference

whether he remembers it or not. You have a right to ask what question you want to ask whether he remembers somebody being present or not, so let's get on with the case.

Q. (By Mr. Munson): *Now, that night when you came home did you or did you not get in bed with Florence Dalton?* [408]

Mr. Ziegler: Now, if the Court please—

A. *I don't remember that.*

Mr. Ziegler: Just a moment. *We object to that as absolutely immaterial.*

Mr. Munson: Your Honor, it is being introduced under the pattern, intent, motive exception that—I mean, this is only an impeaching question, but the evidence which is sought to be elicited is perfectly admissible.

Mr. Ziegler: It is collateral and would open up the whole thing for a trial on another claim that someone—

The Court: For instance, in the present state of the testimony I don't think that—it is just a question of credibility. There isn't any question of intent, *and I can't think of any issues in the case that would call for the admission of any evidence,* under any of the known exceptions to the hearsay rule or under the rule as to the admissibility of evidence, *of other offenses.* For instance, where there is a question of intent, a question of knowledge, a question of motive, a question of system, why, *evidence of other offenses* is admissible, but I just don't see any such situation as that in this case.

Mr. Gilmore: Is that all, Mr. Munson?

Mr. Munson: I am afraid to get into any discussion of this, *your Honor, in front of the jury* for fear that it may be prejudicial."

In view of the previous attempt of the District Attorney and the colloquy between court and counsel on the second occasion, there can be little doubt that the jury was aware of the fact that the prosecution claimed that the defendant had committed another sex crime against another person. It is submitted that notwithstanding the fact that the trial court sustained the objection of defense counsel, appellant was seriously prejudiced. This conclusion is fortified by the fact that as part of the recording (R. 395-396) while the prosecutrix was under the influence of sodium pentothal the following occurred (R. 395, 396):

> "Q. Now, I think *last night you told me that he tried the same sort of thing with somebody else?*
>
> MR. ZIEGLER (Interposing during the playing of the recording): Now, if the Court please, just a moment.
>
> A. I couldn't be positively sure, *but, I mean, oh, yeah, on that one I could.*
>
> (Playing of recording suspended.)
>
> MR. ZIEGLER: Just a moment. That part of it the Court has ruled on.
>
> THE COURT: That part of it is within the Court's ruling."

Counsel for appellant are not sure whether the questions contained in the excerpt last quoted were asked by the District Attorney or by Dr. Anderson, but, of course, insofar as the effect upon the jury is concerned it makes no difference. The damage to appellant was done.

In the instant case the trial court to the great prejudice of appellant had permitted the prosecutrix to testify to numerous acts of sexual relations between the

parties not charged in the indictment without objection thereto having been interposed and without the trial court having advised the jury that such testimony of previous sexual misconduct of the appellant toward the prosecutrix could be considered only as corroborative evidence and not as evidence of the charges tried. In fact the trial court permitted testimony to be introduced of the conduct between appellant and the prosecutrix preceding by seven years the trial. In many jurisdictions the admission of such testimony of collateral crimes even between the same parties has been categorically rejected on the ground of undue prejudice against a defendant, unless issues of identity, intent, or the application of the *res gestae* doctrine made such testimony otherwise competent. The admission of such testimony of other crimes between the same parties or with other parties renders nugatory the presumption of innocence which is to be accorded to the defendant; it indicates that the defendant is a man of depraved character; and imposes the obligation upon him of having to meet issues at the trial, which he is not prepared to meet. See: Annotation 167 A.L.R. 565-628, "Admissibility in Prosecution for Sexual Offenses, of Evidence of Similar Offenses," particularly pp. 567-570. It cannot be disputed that a large majority of jurisdiction in statutory rape cases exclude the admission of such testimony of criminal conduct with other parties because of its prejudicial character. 167 A.L.R. 588-590.

Appellant is convinced that a reading of the record leaves no doubt that notwithstanding the trial court's correctly sustaining objections to the introduction of this testimony, the prosecution succeeded in impress-

ing the jury that appellant had committed similar crimes with another party. Thus there exists an additional reason why defendant should be awarded a new trial.

V. The trial court's comments concerning implied coercion and undue influence exercised by appellant upon the prosecutrix in the matter of the latter's retraction of her accusations constituted plain error

When appellant attorney sought to introduce into evidence the retraction of the prosecutrix (D's. Exh. B) the trial judge in presence of the jury commented as follows (R. 193):

> "THE COURT: Well, of course, a good many of those objections are obviated by the fact that it bears her signature, but I am rather in doubt about its admissibility, due [210] to the fact that the girl was only at the time fourteen years of age and was *taken by her foster father to the office of an attorney, and it seems to me that the influence that the father exuded over her would be presumed.* I am just wondering whether it is admissible under the circumstances developed by this case."

(R. 194):

> "THE COURT: I am not saying that there was actual coercion or anything, but the circumstances were *such that it would imply coercion, the relationship of the father to a fourteen-year-old girl.*"

(R. 196):

> "THE COURT: Well, it isn't the sworn character of it so much as it is her signature on it, and, of course, when you speak of her signature, *then we are confronted with the question of whether the*

circumstances were such that they constituted coercion or undue influence."

(R. 196-197):

"THE COURT: It isn't so much — my ruling doesn't for a moment imply that there was any actual coercion or any psychological pressure or anything of the kind. My ruling involves the question of whether or not the circumstances and the relationship of these people *were not such as to imply undue influence and coercion without anything having been said,* but of course there is testimony here of the complaining witness that *answers were suggested to her by the defendant.*"

(R. 197):

"THE COURT: Oh, that is not stating the situation here. The crucial thing here is the relationship between the parties and the *undue influence that one had within his power to exercise over the other.* That is the crucial question."

Clearly the retraction of the prosecutrix was the heart of appellant's case. We are not unmindful of the fact that a federal judge has the right to comment on the evidence. We are equally mindful, however, of the fact that the discretion given to a federal judge in commenting on the evidence is a judicial discretion, which must be exercised in a fair and impartial manner, and the comments must have some basis in fact. We do not believe that there exists a rule of law according to which the relationship between a father and a fourteen-year-old adopted daughter implies coercion without any evidence thereof existing. In the instant case the testimony of the prosecutrix herself as well as the surrounding circumstances negative entirely the existence of undue

influence or of coercion (R. 42, 43, 60, 61, 283, 341, 342). It is perhaps true that defense counsel should have objected to the comments of the trial judge, in spite of the adverse effect such attitude on his part might have had upon the jury. Nevertheless when we realize the position occupied by a federal judge, his dominating influence with a jury because of his position, it is submitted that these comments constitute plain error entitling defendant to a new trial.

On this point the situation confronting the court is closely analogous to that encountered in the case of *Williams v. U. S.,* 93 F.(2d) 685, where this court awarded a new trial to a defendant in a criminal cause on the ground that the trial court in examining and cross-examining numerous witnesses had virtually assumed the role of prosecutor. The appellee in that case stressed the fact that the defense attorney had not objected to examination by the trial judge and could therefore not urge the claimed error. This court squarely ruled (p. 690):

> "Be that as it may, counsel are not held to strict accountability for failure to object or except when the questions are asked *by the court*. . . . "

and we might add, when the comments are made by the court. In awarding the appellant a new trial this court quoted with approval the following language (p. 691):

> " . . . The evidence taken as a whole, might be so conclusive of the defendant's guilt that an appellate court would not be justified in interferring with the judgment on this count alone. But in a case where there is substantial conflict in the evidence as to the essential points that were required to be submitted to the jury, the course of the judge in unnecessarily

> assuming to perform the duties incumbent primarily upon others might make it the duty of an appellate court, on this ground alone, to grant a new trial."

It is submitted that the decision of the United States Supreme Court in the case of *Quercia v. U. S.,* 289 U.S. 466, 77 L.ed. 1321, 1325, is likewise in point. In that case a new trial was granted to a convicted defendant on the ground that the trial court had committed reversible error in commenting on the evidence in an instruction (trial court in effect had called the defendant a liar). The United States Supreme Court ruled (1325):

> "This privilege of the judge to comment on the facts has its inherent limitation. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, *but he may not either distort it or add to it.* His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, *and especially that it should not be one-sided;' that 'deductions and theories not warranted by the evidence should be studiously avoided.'* "

VI. The trial court committed reversible error in striking the testimony of all character witnesses who testified to the bad reputation for truth and veracity of the prosecutrix

Counsel for the defendant called three character witnesses who testified to the bad reputation of the prosecutrix for truth and veracity (R. 351-369).

The witness, Johnson, testified (R. 330-361) that during 1949-1950 he had occasionally employed the prosecutrix as a baby sitter. He testified that he was familiar with her reputation at a date immediately prior to the time the charges were filed against appellant (R. 352); he stated that he would not believe her under oath (R. 352); that he and his wife had discussed her reputation with others and that it was bad (353); he named several people with whom he had discussed her reputation, and stated that he was unable to recall the names of others with whom he had discussed the matter (R. 354, 355) shortly before the trial.

The witness Tasuda testified that he had heard the reputation of the prosecutrix discussed by her father and by her brother and by several other people whose names he could not recall (R. 362). He stated that these discussions took place approximately a year and one-half previous to the filing of the charges in the instant case (R. 364).

The witness Robert Baer testified that he had personally known the prosecutrix during early 1954 (R. 365); that he had discussed her reputation with the witness Johnson (R. 366), with an uncle of the prose-

cutrix and that he had heard it discussed at the V.F.W. Club but could not remember by whom (R. 369).

Whatever weight was to be attributed to this testimony was of course a question to be determined by the jury under proper instructions. In view of the credibility of the prosecutrix being the key issue of this trial, appellant points out that the ruling of the trial court in striking all the character testimony was highly prejudicial to appellant and constitutes another ground why a new trial should be awarded to appellant.

VII. The trial court erred in restricting testimony of appellant concerning hostility between himself and the prosecutrix to thirty days preceding her accusing appellant, and not permitting any testimony to be introduced concerning hostility between the prosecutrix and her mother and excluding testimony of motive on the part of the prosecutrix in making the accusations against appellant

The trial court restricted testimony of hostility between appellant and the prosecutrix to thirty days immediately preceding her accusations against appellant (R. 246, 248, 249, 252, 253, *259, 261, 262*). The court refused to permit the appellant or his wife to show hostility between the mother and the prosecutrix entirely (R. 299, 226, 227). The trial court likewise refused to permit appellant's wife to testify concerning possible motive of the prosecutrix in making the charges against appellant (R. 211, 216, 217). In view of the fact that the court had permitted the prosecution to introduce testimony of the relationship between appellant and the prosecutrix for a period of approximately seven years

and in view of the importance as a motive of hostility between the prosecutrix and her adoptive parents, it is difficult to understand the trial court's rulings. That the appellant was highly prejudiced thereby can scarcely be questioned.

CONCLUSION

It has been shown that the trial court erred in permitting the psychiatrist to give his opinion as to the credibility to be attached to testimony of the prosecutrix. It has been demonstrated that the admission into evidence of the sodium pentothal recording violated the hearsay rule, is contrary to all reported decisions, deprived the appellant of the right of cross-examination and violated his constitutional right to be confronted with the witnesses against him. It has been established that a sodium pentothal test lacks scientific validity and that its use is highly prejudicial. It has been made clear that instruction No. 8-A should not have been given.

We are convinced that upon a reading of the full record this court will agree that the story of the prosecutrix lacks the requisite corroboration. In addition the misconduct of the prosecutor in attempting on several occasions to show the commission of a collateral crime of the appellant, the prejudicial comments of the trial court with reference to coercion having been used by the appellant in obtaining the retraction of the prosecutrix and the erroneous rulings of the trial court in excluding testimony of hostility between the prosecutrix and appellant and his wife prevented appellant from having a fair trial.

Appellant prays that the judgment of conviction be reversed.

Respectfully submitted,

PHILIP W. SCHOEL,
Attorney for Appellant.

MAX R. NICOLAI,
Of Counsel.

APPENDIX "A"

Appendix "A" ***is a complete transcript of retraction of prosecutrix of accusations originally made by her against appellant*** **(Deft.'s Exh. "B"; R. 341-347).**

The following statements were made by Loretta Lindsey in response to questions put to her by Robert H. Ziegler, Sr., at 10:15 A.M. on August 25, 1954, in the offices of Ziegler, Ziegler & Cloudy, attorneys for Rollie Lindsey, defendant in the case of the *United States of America v. Rollie Lindsey*. Those present at said time and place were Loretta Lindsey, Rollie Lindsey, Robert H. Ziegler, Sr., and Ruth Francis, Secretary.

Q. Please state your full name and age.

A. Loretta Lindsey. I am 14 years old and in the 8th grade at school.

Q. Do you consider Mr. Lindsey your father?

A. Yes.

Q. *Why are you here this morning?*

A. *So that I can drop this charge against him which isn't true.*

Q. Are you here of your own free will?

A. Yes.

Q. This is purely voluntary then?

A. Yes. I went home this morning for the first time in months *and told my father that I was now prepared to tell the truth.*

Q. Has anyone threatened you or tried to force you to come here and do this?

A. No.

Q. When did you prefer charges against your father?

A. I don't know exactly, but it was about 5 months ago.

Q. What did you charge him with having done?

A. Well—according to what I told "them" he was charged with rape, sodomy and contributing to the delinquency of a minor.

Q. Did you testify to that at the preliminary hearing?

A. Yes, I did.

Q. Did anyone else you know appear to testify against him?

A. I don't know. I said what I had to say and then I left. I signed the complaint.

Q. Who went with you?

A. Reverend Grissett brought me up there and Mr. Davidson.

Q. At the time this preliminary hearing took place, Loretta, were you living at the Lindsey home?

A. No, I wasn't. I was in the hospital. I had run away from home.

Q. *Loretta — why did you and your brother run away?*

A. *I kind of wanted to go to my step-mother's in Seattle* and I phoned her up and she didn't know what to do. I was kind of disappointed and I really don't know exactly why I said what I did about my father and that is the only reason I can think of that I did it.

Q. You mean then that by saying what you did you thought you would be able to go to live with your step-mother?

A. Yes.

Q. Then you made this whole thing up "out of whole cloth"?

A. Yes.

Q. You mean that this is nothing but a figment of your imagination?

A. Yes.

Q. Did you realize, Loretta, when you testified to all these charges in the Commissioner's Court at the preliminary hearing, that you were under oath to tell the truth?

A. *I knew I was under oath but that didn't mean anything to me then.* But when I was up in Wrangell, Jack (Krepps), the Marshal up in Wrangell, told me what it meant when you lie under oath. I believe he had an idea I had been lying. *Last Sunday and Monday (August 22nd and 23rd) I told him I was lying.* When we talked about it, he didn't want Mrs. Krepps to be there as she didn't know anything about this and he didn't want her to hear what I said as they were friends and I had stayed with them in Wrangell one time.

Q. Why are you making these statements now, Loretta?

A. I want to go back to my family and I don't want the little Lindsey kids to have their Dad taken away from them for something he didn't do.

Q. You realize you have done a pretty serious thing to Rollie?

A. Yes, I know.

Q. Did you name specific instances and dates at the hearing?

A. Yes, I did.

Q. Where were they supposed to have taken place?

A. At our home on Woodland Avenue, when Mrs. Lindsey was having children. They were the only dates when I knew he was home as he is gone a lot of the time.

Q. *That is the reason you named those specific dates then, because you knew if the authorities checked they would find out that he was at home at those times?*

A. Yes.

Q. You must have hated him pretty badly to have made such charges.

A. I thought I did, but I was wrong.

Q. What would you like me to do about this?

A. I would like to have those charges dropped. I believe the U.S. Attorney has already dropped the case as Mr. Krepps called him up and asked him to.

Q. You know I intend to send a copy of your statement to the District Attorney immediately, because if what you say now is true, and I presume it is, the charges you made previously are very serious and you have just about destroyed your Dad's reputation in the community?

A. Yes, I know.

Q. I am going to have you sign this statement, under oath, and it will in effect result in your stating, under oath, that you lied previously, under oath. Can you think of anything else you would like to tell me, Loretta?

A. No.

Q. Have you ever asked your Dad and Mother here if you could go and live with your step-mother in Seattle?

A. Yes, and they were willing, but my step-mother didn't want me at that time.

Q. Where did you get the idea to do this, Loretta?

A. I don't know. I read a lot of mystery stories, and I guess that is where I got the idea.

Q. You are familiar with the word "frame" then and that is what you thought you would do to your Dad?

A. Um humm.

Q. Who was the first person you went to with this story?

A. I don't know.

Q. You had the idea after you left the Lindsey home?

A. No, before I left.

Q. Where did you go when you left ?

A. To my grandmother's.

Q. And then you put the idea into effect?

A. Yes.

Q. *If you were already out of Rollie's home, why did you have to use this method?*

A. *It would have been pretty hard to go to the States —to get out of town.*

Q. When you finally decided to put the plan into operation, who did you go to see?

A. Well—the Don Riewalds knew. I told them I wouldn't be baby-sitting for them any more and he asked me why and I said my folks were kind of mean to me and he said I wasn't telling them all, and so I did and I don't know whether he believed me or not but he said to go see the City Magistrate and that is where I went.

Q. Then you lied to him—you lied to the Magistrate — you lied to the Marshal — and you lied to the U.S. Attorney?

A. Yes.

LORETTA LINDSEY

Subscribed and sworn to before me this 25th day of August, 1954, at Ketchikan, Alaska.

ROBERT H. ZIEGLER
Notary Public for Alaska
My commission expires: 3/10/57.

APPENDIX "B"

Appendix "B" ***is a complete transcript of the sodium pentothal interview of the prosecutrix which was played to the jury by means of a recording*** **(R. 385-399).**

Whereupon the tape recording was run off as follows, with questions by Doctor Anderson and answers by Loretta Lindsey:

Q. O.K., Loretta. Loretta, can you hear me?

A. Yes.

Q. Now, I want to ask you this. You have talked about Mr. Lindsey, haven't you?

A. Yes.

Q. Now, who is Mr. Lindsey?

A. My adopted father.

Q. O.K.

(Playing of tape recording suspended.) [424]

MR. MUNSON: Is that the interview at the beginning as you remember it?

DOCTOR ANDERSON: That is right.

THE COURT: I think you should put it on the table there in front of the jury and not have it so loud.

MR. MUNSON: I have only got a small lead.

THE COURT: Oh.

(Playing of tape recording resumed.)

Q. (By Doctor Anderson): And is he the husband of your aunt who adopted you; is that right?

A. (By Loretta Lindsey): Yes.

Q. Did Mr. Lindsey adopt you or did Mrs. Lindsey only adopt you?

A. They both.

Q. They both adopted you?

A. Yes.

Q. And he is your uncle by marriage before he adopted you?

A. Yes.

Q. That is right. Now, you have said some things about Mr. Lindsey that has caused some concern; is that right?

A. Yes.

Q. Now, what about that? You have said some things about him, *and then you have changed your story a little bit;* do you recall doing that?

A. Yes. [425]

Q. Now, did Mr. Lindsey have sexual intercourse with you?

A. Yes.

Q. Did he do it very often?

A. Whenever he was home.

Q. How old were you when he first started this kind of thing?

A. About nine, I guess.

Q. And did he actually have intercourse with you when you were nine?

A. No.

Q. What did he do then?

A. Well, he—he——

Q. When you were nine what did he do?

A. He called up my Mom and told me to bring something down to the boat to him, and——

Q. This is the first time now?

A. Yes.

Q. Yes; all right.

A. And then he sent my brother Bob away when I got there and he took the boat off and drifted it out into the bay.

Q. This was in Ketchikan?

A. Yes.

Q. And you were nine years old?

A. Yes.

Q. And when the boat was drifting in the bay what did he do?

A. Well, he told me to go downstairs, and so I did, and then [426] he came downstairs with some lard in his hand and he put that on his, oh. I guess you would call it, penis, and he put it on there; I don't know why; but he told me to lay down, so I did what he said to do, and then he got on top of me.

Q. Did you have your clothes on?

A. Part of them.

Q. Did he take them off, or did you?

A. No. He did.

Q. And when he got on top of you, what did he do?

A. He put his penis into my private part of my body, and it wouldn't go, and he kept on trying to force it to go, and I screamed.

Q. Did it hurt?

A. Yeah.

Q. Did he ever get it in?

A. Not when he first tried.

Q. Not that time?

A. No.

Q. How long—how much later was it that he first got his penis in?

A. Well, the first time he really got it in was when my mother went to the hospital.

Q. This is your adopted mother?

A. Yes. [427]

A.Yes.

Q. Yes. She went to the hospital?

A. Yes.

Q. For what?

A. To have a baby.

Q. Was that her first baby?

A. Yes, it was.

Q. What was the date of that? Do you remember the date?

A. October 22nd. He will be three this year, so it was about three years ago.

Q. Three years ago October 22nd. What year would that be then?

A. 1951, I guess.

Q. 1951. That was the first time he ever got in?

A. Yes.

Q. How old were you then?

A. I was twelve.

Q. You were twelve. Had you started having periods then?

A. Yes.

Q. Had you developed as a woman by that time?

A. I guess you would say that.

Q. You have told Mr. Munson about this first time before, have you?

A. Yes, I have.

Q. Now, he was able to get inside that time?

A. Yes.

Q. Did it hurt?

A. Yes, it did, very much.

Q. Did it make you bleed any?

A. No.

Q. Now, are you telling us exactly what happened?

A. Yes, I am.

Q. Now, why are you telling this?

A. Because I can't take any longer what he was doing to me and to help my sister so she won't have to go through the same thing I have gone through.

Q. Where is your sister?

A. She is home.

Q. Does she live with the Lindseys?

A. Yes.

Q. How old is your sister?

A. She will be two this coming November.

Q. Two?

A. Yes.

Q. Well, now you said a baby was born three years ago?

A. That was my little brother.

Q. Oh, that was you little brother?

A. Yes.

Q. Now, then, your sister is almost two?

A. Yes. [429]

Q. Now, is this your sister, your full-blood sister?

A. No. She is actually my cousin.

Q. She is actually your cousin?

A. Yes.

Q. And she is also your adoptive sister; is that correct?

A. Yes.

Q. Now, Loretta, why did you later change your story and tell your father, your adoptive father, that this wasn't so?

A. Well, he knew it was so, but I wanted to do that to help my Mom and the kids.

Q. What do you mean by that?

A. Well, they would have lost their Mom and Dad and things and so——

Q. Would they have lost their Mom?

A. Yes.

Q. How would they have lost their Mom?

A. By having Mr. Lindsey sent away.

Q. Would that be their Mom or their Pop?

A. And her husband and the kids' Dad.

Q. Oh, I see. You felt sorry for Mrs. Lindsey and the kids?

A. Yes.

Q. Well, didn't you go to a lawyer with Mr. Lindsey and swear that the story wasn't true?

A. Yes. [430]

Q. Now, why did you do that?

A. Because I, because I had to do it because——

Q. You had to?

A. Yes.

Q. What do you mean, you "had to"?

A. Well, because my Mom is actually my aunt, and I didn't want to hurt her or the kids.

Q. Oh, you didn't want to hurt her or the kids?

A. Yes.

Q. When you went to the lawyer, you went there with your foster father, didn't you?

A. Yes.

Q. With Mr. Lindsey?

A. Yes.

Q. When you went there, were you telling the truth or were you telling a lie?

A. I was lying.

Q. You were lying. And you said you were lying to protect them?

A. Yes.

Q. Now, then, later you talked to Mr. Munson again, didn't you?

A. Yes.

Q. And did you tell him the truth or a lie?

A. The truth. [431]

Q. The truth. Do you remember when you saw me in April of this year?

A. Yes.

Q. Do you remember when you came and talked to me?

A. Yes.

Q. Were you telling me the truth then?

A. Yes.

Q. Do you remember talking to Mr. Parsons a few days ago, this week?

A. Yes.

Q. And he gave you some tests and had you tell some stories?

A. Yes.

Q. Were you telling him the truth?

A. Yes.

Q. *Now, are you telling us the truth now?*

A. *Yes.*

Q. Now, then, the truth is what? *Is it the truth that Mr. Lindsey did all these things with you?*

A. Yes, it is.

Q. How many times can you remember actual dates? You mentioned October 22, 1951, didn't you?

A. Yes.

Q. What happened on October 22, 1951? Did he have intercourse with you on that date? Loretta? Loretta? Can you hear me? [432]

A. Yes.

Q. Are you sleepy?

A. Yes.

Q. Are you real sleepy?

A. Yes.

Q. Can you tell me what happened on October 22, 1951?

A. October 22nd?

Q. 1951.

A. That was when my little brother Randy was born.

Q. What did Mr. Lindsey do then?

A. He told me to stay home and do the wash for him in the afternoon because we had about a half a clothes full of dirty clothes.

Q. Was this on October 22, 1951?

A. Yes.

Q. Was this the time he took you on the boat?

A. No. It happened at the house.

Q. Oh, this happened at the house, the first time he succeeded with you?

A. Yes.

Q. You mean, the first time he got his penis into you?

A. Yes.

Q. He did that in the house?

A. Yes.

Q. The boat time was when you were nine years old? [433]

A. Yes.

Q. Did he do anything in between those times, the first time on the boat and then this time on October 22, 1951; did he fool around with you at all in between?

A. Yes.

Q. Very many times?

A. A lot of times.

Q. And what did he do to you?

A. Well, he tried intercourse a lot more times in between.

Q. And didn't succeed?

A. Yes; and then he used his tongue and his fingers.

Q. On you?

A. Yes; and he stuck his penis in my mouth.

Q. Did he do that very many times?

A. Yes, he did.

Q. Then, can you remember any other exact dates when he had intercourse with you?

A. Besides the one I just gave you?

Q. Yes; besides this October 22, 1951, date. Any since then; and the dates since then you can remember?

A. Two other ones.

Q. What are those dates?

A. October 22, 1952, and February 27, 1953.

Q. How do you remember those dates?

A. Because my mother went to the hospital.

MR. MUNSON: Loretta, don't you mean February 27, 1954? Wasn't it this year? Do you remember that date?

A. Yes.

Q. (By DR. ANDERSON): February 27, 1954?

A. Yes.

Q. And what was the date of the second baby?

A. The date?

Q. The date it was born, the second baby?

A. February 27th.

MR. MUNSON: That is the third baby.

Q. (By DR. ANDERSON): Is that the third baby?

A. Yes.

Q. What about the second baby?

A. The second baby?

Mr. Munson: Your sister.

Q. (By Doctor Anderson): Your little sister; what is that date?

A. Well, she went to the hospital and had her, had my little sister Janice.

Q. What was the date for that?

A. October 23, 1952.

Q. She had one in 1951, another one a year and a day later in 1952, and then a little over a year later the next one comes in 1954; is that right?

A. A year and forty-five minutes. [435]

Q. A year and forty-five minutes; just over the line?

A. Yes.

Q. Well, now, that means every time your step-mother, not step-mother, but your foster mother, went to the hospital this foster father of yours had intercourse with you?

A. Yes.

Q. Did he do it other times, too?

A. Yes; but I can't remember the specific dates.

Q. Oh, that is why. Well, now, how often did it happen?

A. Specific dates, or not?

Q. No. I mean, not specific dates, but just as you went along there living with him, how often did he have intercourse with you?

A. Whenever he came home.

Q. Well, how often would that be?

A. Oh, once every two weeks, or two times every two weeks.

Q. So he had it every week or every two weeks? Can you hold still, Loretta? Now, why did you decide to go back and tell the same story again, Loretta? What is

the matter? Loretta? Are you awake? What is the trouble, Loretta?

A. I don't feel awake.

Q. You don't feel what?

A. I don't feel awake.

Q. You don't feel awake? Do you feel sleepy?

A. Yes. [436]

Q. Why are you crying?

A. Something is hurting.

Q. Where does it hurt?

A. I don't know.

(Pause—no recording audible.)

Q. You are not crying because of what you have told us, are you?

A. No.

Q. Where does it hurt?

A. It doesn't hurt any more.

Q. It doesn't hurt any more now?

A. No.

Q. That was the needle that was hurting; see; that needle I stuck in your arm. It has stopped hurting now?

A. Yes.

Q. Why did you decide to tell Mr. Munson the truth again?

A. Because Mr. Lindsey told me that he didn't know if he could control himself after I came home.

Q. You mean he tried to do it to you again?

A. Yes.

Q. Did you like that idea?

A. No.

Q. You didn't like it?

A. No.

Q. So you—is that the only reason you decided to tell the [437] truth again?

A. No.

Q. What other reasons?

A. He told me right in front of my Mom and my Gram, because the doctor said I had actual intercourse with someone, and he said to say that I just stuck a banana or something up me.

Q. Did you like that suggestion?

A. No. And I couldn't see how my Mom or my Gram could believe somebody would say that.

Q. *Now I think last night you told me that he tried the same sort of thing with somebody else?*

MR. ZIEGLER: (Interposing during the playing of the recording.) Now, if the court please, just a moment.

A. *I couldn't be positively sure, but, I mean, oh, yeah, on that one I could.*

(Playing of recording suspended.)

MR. ZIEGLER: Just a moment. That part of it the Court has ruled on.

THE COURT: That part of it is within the Court's ruling.

Whereupon the volume was turned down so the recording was inaudible; and thereafter the playing of the recording was resumed as follows:

Q. (By DOCTOR ANDERSON): Why didn't you tell about Mr. Lindsey [438] before you really did tell about him? Why didn't you tell earlier?

A. Because I didn't know who to go to or what to tell anybody because my cousin Faye said (volume again turned down so recording inaudible)—and nobody believed her.

Your cousin Faye—Faye who?

(Volume again turned down so recording inaudible.)

Q. Were you scared to tell?

A. Yes.

Q. Then what made you finally decide to tell?

A. Because he hit me a lot of times.

Q. Is that the only reason, because he hit you?

A. And because I just couldn't take it any more.

Q. Now, who was the first person you told?

A. The first person I told was Mr. and Mrs. Don Riewold.

MR. MUNSON: Are you sure it wasn't Arleen Field?

A. Well, I told her before then, but those were the grownups.

MR. MUNSON: Oh.

Q. (By DOCTOR ANDERSON): The first grownups?

A. Yes.

Q. Then did you tell other people too?

A. Yes, I told my brother Bob about it.

Q. Did you tell any policeman about it?

A. No. My brother did that.

Q. Your brother did that? [439]

A. Yes.

Q. And you told them because you were tired of the whole situation?

A. Yes.

Q. *Have you been telling us the truth all the time while we have been talking to you here?*

A. *Yes.*

Q. Are you still sleepy?

A. Yes.

Q. Oh, let me ask you this, Loretta. Did you enjoy these experiences with your uncle?

A. No.

Q. No. Now, I would like to ask you one thing else.

You told Mr. Munson that your uncle used to put his penis in your mouth and then have intercourse with you, and you told me that he would have intercourse with you and then after he lost his erection then he would put it in your mouth. Now, which way did it happen?

A. He did both, but he didn't put his penis in my mouth after he had intercourse with me as much as he did, as he put it in before.

Q. He did it more before than after?

A. Yes. He usually did that when he used the rubber.

Q. In addition to putting his penis in your mouth, did he ever put his mouth on your sexual organs? [440]

A. Yes, he did.

Q. Which did he do oftener?

A. His penis in my mouth.

Q. He did that more than putting his mouth on your sexual organs?

A. Yes.

Q. Did he use his tongue on your organs?

A. Yes, he did, and his finger once in a while.

Q. Did he seem to enjoy it?

A. I guess he did.

Q. Did you enjoy it?

A. Not very often.

Q. Usually not?

A. Yes.

Q. *Now, did he do something like this every time he had intercourse with you?*

A. *Yes, he did.*

Q. One or other of those things first?

A. Yes.

Q. And then intercourse?

A. Yes.

Q. And once in a while afterwards?

A. Yes.

Q. Did the fluid ever go into your mouth?

A. *It did that practically every time he put his penis in my* [441] *mouth.*

Q. Then after he had the fluid go in your mouth, then he would have intercourse with you?

A. No. I mean, when—after—I mean sometimes I would be menstruating, and he would put his penis in my mouth because I couldn't have intercourse with him.

Q. Oh.

A. And he would let it go then, and, even sometimes when I wasn't, he would, but, when he had intercourse, he would usually make me—he would put his penis in my mouth and make me lick it so he could put the rubber on it.

Q. Oh, he would do that first?

A. Yes.

Q. Did he always use a rubber?

A. Not always.

Q. Did he usually use a rubber?

A. I guess you would say that; yes.

Q. When he didn't use a rubber, what did you do?

A. *Well, he usually let that stuff go into me, and right afterwards I would go into the bathroom and wash out as best I could.*

Q. What did you use to wash out?

A. Oh, one of those—

Q. Did you have a syringe?

A. Yes; I guess you would call it that. [442]

Q. You would wash it out quick so you wouldn't get pregnant?

A. Yes.

Q. Were you afraid you might get pregnant?

A. Yes, I was.

Q. Did he ever say anything about the possibility that you would get pregnant?

A. No.

(Playing of the tape recording concluded, and Direct Examination of Doctor Anderson was continued by Mr. Munson as follows:)

APPENDIX C

Appendix C ***consists of selected excerpts from article in 62 Yale Law Journal 315 (1952-1953) "Drug Induced Revelation and Criminal Investigation."***

p. 317 "* * * Referred to in the popular press as "truth-serum," the drug used is not a serum and, as will appear, people do not always tell the "truth" under its influence. * * *"

p. 318 "* * * * The results, though not definitive, indicated that "normal" individuals (i.e., persons who perform adequately in their various functions, have good defenses and no highly pathological characteristics) are less likely to confess. "Neutrotics" are more likely to break down and, what is of equal importance, to substitute fantasy for truth. * * *"

p. 319 "* * * An analysis of confessions obtained during narcoanalysis found that fantasies and delusions which frequently could not be distinguished from reality significantly limited the credibility of the statements. * * *"

p. 319 "In summary, experimental and clinical findings indicate that only individuals who have conscious and unconscious reasons for doing so are inclined to confess and yield to interrogation under drug influence. On the other hand, some are able to withhold information and some, especially character neurotics, are able to lie. Others are so suggestible they will describe, in response to suggestive questioning, behavior which never in fact occurred. * * *"

p. 325 "* * * Considering the present state of scientific knowledge, as developed in the medical section of this article, a transcript of the interview should definitely not be admissible in evidence. Only the most san-

guine of the clinical investigators, unaware of the psychological complexities of material produced under the influence of drugs, have automatically accepted this material as "truth." Furthermore, utterances made while under drugs are frequently thick, mumbling, and disconnected. Both judge and jury would be at a loss to evaluate the material. Here again, the courts invoke the hearsay rule and exclude. This is not only unnecessary but delusive. The unreliability of the results and the lack of expert interpretation are sufficient reasons for exclusion. * * *"

p. 340 "Admittedly, the dividing line between truth and untruth is a shadowy one. It is debatable whether psychology and psychiatry have progressed to the point where they are able (with or without narcoanalysis) to establish the truth or falsity of testimony. * * *"

p. 342 "* * Generally, relaxation is facilitated, verbalization is less inhibited, and there is freer expression of fact—*as well as of fancy and suggestion.* In some cases correct information may be withheld or distorted and, in others, erroneous data elicited through suggestion. * * *"

p. 346 "I believe it should be stressed that sodium amytal is not a truth-eliciting device. There are offenders who are able to cover up guilt even under deepest narcosis. The depth of narcosis, however, is an important consideration.

"While psychological material obtained under medication is usually valid, it is still possible for individuals to fantasize. This is especially true of pathological types with poorly differentiated ego structure, where the line between reality and fantasy remains extremely thin. In such cases great care must be exercised to avoid mistaking an unconscious fantasy for real experiences."